BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities.

Rulemaking 05-04-005 (Filed April 7, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING MOTION TO COMPEL RESPONSES

By motion filed on August 19, 2005, Pacific Bell Telephone Company (SBC) seeks an order compelling Cox California Telecom (Cox) to provide full responses to data requests. This ruling confirms the informal ruling made by e-mail communication on August 30, 2005, granting SBC's motion and directing Cox to provide full responses by no later than Tuesday, September 6, 2005.

Five of the 10 data requests at issue seek information regarding the extent of cable services provided by Cox's affiliates. The remaining five data requests seek Cox's contention regarding whether SBC faces barriers to entry in competing with Cox for its cable television customers and the basis for any such assertions. Cox objects to all of the data requests on the ground that, because the Commission does not have jurisdiction over cable television or cable modem services, such services are therefore irrelevant to any rulemaking undertaken by the Commission.

Cox's objection is without merit. Relevancy of information to a

Commission proceeding is not defined by the Commission's jurisdiction over the
entities to which the information pertains. The question of relevancy is whether
the information has "any tendency in reason to prove or disprove any disputed

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fact that is of consequence to the determination of the action." (Cal. Evid. Code § 210.) The information sought in this discovery dispute has a tendency to prove or disprove the existence of competition for telecommunications services. The existence of competition for telecommunications services is a fact that is of consequence to this rulemaking.

Cox points out that cable television and cable modem services are not telecommunications services under federal or state law. Nevertheless, cable services provide the potential for cable telephony services that may compete with regulated telecommunications services. As the order instituting rulemaking (OIR) points out, "ILECs now compete with cellular and cable TV companies in both the local and long-distance markets [....] These changes have created a need for the Commission to conduct a comprehensive examination of the way it regulates telecommunications services." (OIR, p. 2.) An inquiry into the extent to which unregulated cable services compete with ILECs in both the local and long-distance markets informs this proceeding, regardless of their status under federal and state law.

The fact that Cox's parent, Cox Communications, Inc., and its cable affiliates are not regulated by the Commission does not excuse Cox from responding to discovery. Rather, taking guidance from the California Code of Civil Procedure (CCP), the issue is whether Cox has "possession, custody, or control" over the documents and information that SBC seeks. (CCP § 2301.010(a).) Federal courts, interpreting this same language with respect to the Federal Rules of Civil Procedure, have found that a subsidiary can have control over its corporate parent's documents. Evidence the courts have considered includes the degree of ownership and control the parent exercised over the subsidiary, whether the two entities operated as one, whether an agency

relationship existed, and whether there was "demonstrated access to documents in the ordinary course of business." *See Camden Iron*, 138 F.R.D. 438, 442 (D.N.J. 1991); and *Japan Halon Co., Ltd. V. Great Lakes Chemical Corp.*, 155 F.R.D. 626, 628 (N.D. Ind. 1993). Similarly, courts have found that a subsidiary can have control over a fellow subsidiary's documents. The same types of factors apply: commonality of ownership, the exchange or intermingling of directors, officers, and employees, exchange of documents in the ordinary course of business, benefit or involvement by the non-party affiliate in the transaction at issue, and involvement of the non-party in the litigation. *See Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998).

Cox does not dispute that it has possession, custody, or control of the documents and information requested as defined by these factors. Cox states that it and all of its affiliates use the same d/b/a, indicating a very close relationship between the entities. Cox admits having produced documents of other Cox entities in response to SBC's discovery requests, demonstrating that Cox has access to its parent's and affiliates' information. We conclude that Cox has control of the requested information, enabling it to comply with this discovery ruling.

Cox asserts that SBC already has "much of the information" that it seeks here and that "deals directly with the questions SBC poses here," and cites for this proposition to SBC's testimony and an exhibit in A.05-02-027 regarding Cox's telephony and cable presence in California, San Diego, and Orange County. Cox does not identify which, if any, of the data requests are satisfied by this information, and it appears that this general information is not responsive to any of the specific data requests posed by SBC. SBC's possession of information

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that "deals" with a subject does not excuse Cox from providing full data responses to specific requests.

Cox asserts that, if SBC is trying to show the level of competition from cable companies in the areas of video services and broadband Internet services, it can obtain that information from public sources and does not need to demand confidential information of Cox entities in those industries. Cox's suggestion does not obviate the fact that the requested Cox-specific information is relevant, having a tendency to prove or disprove, not only the extent of industry-wide competition, but also the credibility of Cox's factual assertions regarding Cox's ability to compete.

Therefore, **IT IS RULED** that Cox California Telecom shall produce the disputed material by no later than Tuesday, September 6, 2005.

Dated August 31, 2005, at San Francisco, California.

/s/ HALLIE YACKNIN

Hallie Yacknin

Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion to Compel Responses on all parties of record in this proceeding or their attorneys of record.

Dated August 31, 2005, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

NOTICE

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.